IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	
	)	
JEANNIE FIRNHABER,	)	Bankruptcy Case No. 03-61451
	)	
Debtor.	)	
_____	)	
	)	
WARREN M. FIRNHABER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary Case No. 04-6010
	)	
JEANNIE FIRNHABER,	)	
	)	
Defendant.	)	

OPINION

This matter having come before the Court for trial on a Complaint to Determine Dischargeability, Motion for Attorney Fees and Costs Incurred and for Sanctions filed by Plaintiff, and Objections of Warren M. Firnhaber (Plaintiff) to Debtor's Motion for Attorney Fees and Costs Incurred and for Sanctions; the Court, having heard sworn testimony and arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

In order to prevail under 11 U.S.C. § 523(a)(15), the Plaintiff must first establish that he has a claim against the Debtor/Defendant other than the type set forth in 11 U.S.C. § 523(a)(5), that was awarded by a Court in the course of a divorce proceeding or separation. In re Paneras, 195 B.R. 395 (Bankr. N.D. Ill. 1996), *citing* In re Silvers, 187 B.R. 648 (Bankr. W.D. Mo. 1995). Once the Plaintiff demonstrates that the debt is other than the type set forth in 11 U.S.C. § 523(a)(5), the burden then shifts to the Debtor/Defendant to show either (1) that she lacks the ability to pay the debt at issue, or (2) that the discharge will be more

beneficial to the Debtor/Defendant than detrimental to the Plaintiff. Paneras, supra, at 403; In re Hill, 184 B.R. 750, at 754 (Bankr. N.D. Ill. 1995); In re Hovis, Bankr. Case No. 99-33504, Adv. Case No. 00-3047 (Bankr. S.D. Ill. 2000).

In determining dischargeability of a debt under 11 U.S.C. § 523(a)(5), evaluation of three factors is required:

(1) the debtor's ability to pay the subject debt;

(2) the non-debtor spouses ability to pay the subject debt; and,

(3) the financial repercussions to the non-debtor spouse of discharging the debt.

It has been uniformly held and recognized that, if the debtor is found to lack the ability to repay the subject debt, the inquiry ends and the debt is deemed dischargeable. If, however, the debtor is found to have the ability to repay the subject debt, the inquiry proceeds to consider the non-debtor spouses ability to pay the subject debt. See: In re Hovis, supra, at page 4; In re Ingalls. Bankr. Case No. 02-72357, Adv. Case No. 02-7186 (Bankr. C.D. Ill. 2003); and In re Bucher, Bankr. Case No. 02-73165, Adv. Case No. 02-7221 (Bankr. C.D. Ill. 2003).

Pursuant to 11 U.S.C. § 523(a)(15), a debt will remain dischargeable if paying the debt would reduce the debtor's income below that necessary for the support of the debtor and debtor's dependents. See: Hill, supra. at 754. Because this language mirrors the disposable income test found in 11 U.S.C. § 1325(b)(2), most Courts utilize an analysis similar to that used in determining disposable income in Chapter 13 cases. See: Hill, supra, at 755, In re Smither, 194 B.R. 102 (Bankr. W.D. Ky. 1996); In re Carroll, 187 B.R. 197 (Bankr. S.D. Ohio 1995); In re Phillips, 187 B.R. 363 (Bankr. M.D. Fla. 1995; and In re Hesson, 190 B.R. 229 (Bankr. D. Md. 1995).

In the instant case, the parties agreed that the debt at issue was not a debt of the type set forth in 11 U.S.C. § 523(a)(5). Therefore, the burden shifted to the Debtor/Defendant to show that she lacked the ability to pay the debt at issue. In this regard, the Court found the

testimony of the Debtor and of her mother to be credible. This testimony clearly established that the Debtor does not have the ability to pay the subject debt. In fact, the Debtor is unable to meet the necessary living expenses of herself and her two minor children, even before factoring in the debt which the Plaintiff seeks to have determined as non-dischargeable. Currently, the Debtor requires help from her parents to meet the expenses of herself and her children. This is exaggerated by the Plaintiff's failure to pay Court ordered child support, and the existence of a substantial child-support arrearage. The Court believes that the Debtor is making every attempt to seek gainful employment, and, given her employment history, it is highly unlikely that, even when she finds employment, her income would rise to a level which would give her the ability to pay the debt which the Plaintiff seeks to be declared non-dischargeable.

Given the clear evidence that the Debtor lacks the ability to pay the debt at issue, the Court must find that the subject debt is dischargeable pursuant to the provisions of 11 U.S.C. § 523(a)(15). This being the case, there is no need to address the question of whether the discharge will be more beneficial to the Debtor/Defendant than detrimental to the Plaintiff.

On September 2, 2004, prior to trial in this adversary proceeding, the Debtor/Defendant filed a Motion for Attorney Fees and Costs Incurred and for Sanctions, alleging that the Plaintiff's Complaint was not well-grounded in fact or existing law, and that, as such, the Plaintiff should be sanctioned and ordered to pay the Debtor's attorney fees and costs as and for those sanctions. At the close of trial on September 3, 2004, the Court allowed Plaintiff's counsel a period of 14 days to respond to the Motion for Attorney Fees and Costs Incurred and for Sanctions. On September 17, 2004, Plaintiff filed its pleading entitled "Objections of Warren M. Firnhaber (Plaintiff) to Debtor's Motion for Attorney Fees and Costs Incurred and for Sanctions," arguing that, pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure, sanctions are inappropriate under the circumstances of this case.

Rule 9011(b)(2) and (3) of the Federal Rules of Bankruptcy Procedure states, in pertinent part, as follows:

> (b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . .
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; . . .

The goal of the sanctions remedy provided under Bankruptcy Rule 9011 is to deter unnecessary filings, prevent the assertion of frivolous pleadings, and require good faith filings. In re Rossi, 1999 WL 253124 (Bankr. N.D. Ill. 1999); Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901, 108 S.Ct. 1101 (1988). The rule is not intended to function as a fee shifting statute which would require the losing party to pay costs. State Bank of India v. Kaliana, 207 B.R. 597 (Bankr. N.D. Ill. 1997) (*citing* Mars Steel Corp. v. Continental Bank, 880 F.2d 928 (7th Cir. 1989)). Thus the Rule focuses on the conduct of the parties and not on the results of the litigation.

The present version of Bankruptcy Rule 9011 provides that, upon presenting in the manner of signing, filing, submitting, or later advocating documents to the Court, a party or their counsel represents to the best of that person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, such document is not presented (1) for any improper purpose, (2) based upon frivolous legal arguments, (3) without adequate evidentiary support for its allegations, and (4) without a basis for denials of fact. These provisions essentially create two grounds for the imposition of sanctions: (1) the "frivolousness clause" which looks to whether a party or an attorney made a reasonable

inquiry into both the facts and the law; and (2) the "improper purpose clause" which looks to whether a document was interposed for an illegitimate purpose, such as delay, harassment, or increasing the costs of litigation. See: Kaliana, supra, at 601.

With respect to the "frivolousness clause" the relevant inquiry has two prongs: (1) whether the attorney made a reasonable inquiry into the facts, and (2) whether the attorney made a reasonable investigation of the law. Home Savings Assn. of Kansas City v. Woodstock Asso., 121 B.R. 238 (Bankr. N.D. Ill. 1990), *citing* Brown v. Federation of State Medical Boards of the United States, 830 F.2d 1429 (7th Cir. 1987). The investigation of the facts must have been reasonable under the particular circumstances of the case. In re Excello Press, Inc., 967 F.2d 1109 (7th Cir. 1992). A pleading is well grounded in fact if it has some reasonable basis in fact. Woodstock, supra, at 242. On the other hand, a pleading is not well grounded in fact if it is contradicted by uncontroverted evidence that was or should have been known by the attorney signing the document. Id. at 243.

Rule 9011(c) states:

> (c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanctions upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
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> (1) How Initiated.
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> (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitations shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

> (B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing the attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.
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> (2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, and order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.
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> (A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).
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> (B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.
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> (3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

It is clearly stated in Rule 9011(c)(2) that a sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. The Rule is not designed as a fee shifting rule from the prevailing parties to the losing parties. Sanctions are limited to those that are "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." See: In re Poli, 298 B.R. 557 (Bankr. E.D. Va. 2003).

Although the Court stated at close of trial on September 3, 2004, that this was the weakest case under 11 U.S.C. § 523(a)(15) that it had seen, the Court cannot find that sanctions are appropriate pursuant to Rule 9011(b). Given that it was not the Plaintiff's burden to prove that the Debtor had the ability to pay the subject debt, the Court finds that the inquiry into the facts made by Plaintiff's counsel was reasonable under the circumstances. Further, the Court finds that there is insufficient evidence to establish Defendant's contention

that the Complaint in this adversary proceeding was filed for an improper purpose. Sanctions pursuant to Rule 9011(b) cannot be entered lightly and must be reserved for only those circumstances where pleadings are clearly frivolous and a lack of good faith has been shown. As such, the Court finds that the Motion for Attorney Fees and Costs Incurred and for Sanctions should be denied.

ENTERED: September 27, 2004.

/s/Gerald D. Fines
GERALD D. FINES
United States Bankruptcy Judge

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Plaintiff,	)	
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	)	
JEANNIE FIRNHABER,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in an Opinion entered on the 27th day of September 2004;

IT IS HEREBY ORDERED that:

A. The Complaint to Determine Dischargeability filed by the Plaintiff on March 8, 2004, is DENIED; and,

B. The Motion for Attorney Fees and Costs Incurred and for Sanctions filed by the Defendant on September 2, 2004, is DENIED.

ENTERED: September 27, 2004.

/s/Gerald D. Fines
GERALD D. FINES
United States Bankruptcy Judge